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Right of Notice and Hearing, "Due Process," and Related Constitutional Rights of Students.

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Opinions about due process as it applies to the contemporary college campus range from the extreme view that due process as defined and practiced in U.S. courts of criminal law should be followed on college campuses to the opposite extreme that an educational community must evolve its own "due process" in light of campus objectives and traditions. Reviewing relevant court decisions, the author feels that the following guidelines approach an equitable middle ground. The student must be: (1) given notice of the charges against him and the grounds that, if proven, would justify his expulsion or suspension; (2) given the names of eyewitnesses against him and a report on the facts to which witnesses testified; (3) given a hearing (public if he requests) and the opportunity to confront witnesses against him and to present evidence in his defense; (4) notified of the time, place, and date of the hearing and allowed sufficient time to prepare a defense; (5) disciplined by a duly-established body operating under regular procedures; and (6) furnished a report of the findings and results of the hearing for his inspection. (MC)

RIGHT OF NOTICE AND HEARING,

"DUE PROCESS,"

AND RELATED CONSTITUTIONAL RIGHTS OF STUDENTS

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BOARD OF REGENTS OF STATE UNIVERSITIES

Madison, Wisconsin

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Brief The State of Missouri ex rel. John Crain v. Isaac Hamilton et al., 42 Mo. App. 24 (1890).

FACTS: Benjamin Crain, seventeen years old, the son of John Crain, while a student in the school taught by Higginbottom in Saline County, Missouri, in November, 1888, against the spoken rules of the teacher and without his permission, but in the absence of written rules, left the schoolroom; carried "brass knuckles;" lay down on his seat; pretended he was asleep; neglected to study; talked aloud; "yallooed" and yelled; ridiculed the teacher; spat; "hawked;" scraped his feet over the floor; mimicked the teacher; assumed grotesque attitudes; swore on the playground; got up fights between smaller boys; smoked and chewed tobacco; spit tobacco juice all over the floor, on the walls and on the windows; squirted tobacco juice on the stove, the coal-scuttle, and the poker; insisted he had the right to use tobacco; gave tobacco to other students and adduced them to chew; and, on Friday, November 30, while going home from school "smoked a pipe, puffing the smoke into the faces of other pupils, and although reprimanded by the teacher, who happened to be present, persisted in his course." Subsequently, at school, he refused to be "whipped or expelled." The teacher reported the case to the school directors, Hamilton, Clark, and Hudson, who talked with the teacher, the boy and his father, and other students, and, after eight days, expelled the boy.

The boy, through his father, denied the facts in circuit court. The circuit court finding and judgment, for the school directors, was appealed to the Missouri Court of Appeals on the contention that (1) the school directors and the teacher had failed to make rules on the basis of which the student could be expelled, and (2) the "due process" requirements of the U.S. Constitution, Section 1, Article 14 and State of Missouri Revised Statutes 1879, Sections 7045 and 7072, had not been complied with.

QUESTIONS: (1) Is the power of expulsion of the school directors limited to cases of infraction of rules formally promulgated? (2) Does "due process" require a formal trial with written charges, notice of hearing, witnesses, etc., to expell a student?

HELD: (1) No.
(2) No.

RATIONALE: There are unwritten, but well-defined, rules of conduct prescribed by a common sense of decency and propriety which may surely not be transgressed with impunity. The school directors have the power to expel a student whenever upon due examination they become satisfied that the interests of the school demand it. From the necessity of such cases, examinations must be informal; e.g., school directors "must frequently come from the plain and unlearned farmers and citizens of the country, unused to matters of judicial inquiry." School directors are asked to investigate and make judgments; these directors did. "There is nothing in this record to justify, in the slightest degree, a charge of haste, partiality, or prejudice."

Memorandum on Schools and School districts, Colleges and Universities; Students, Conduct, and Discipline; Expulsion or Suspension; Right of Notice and Hearing, "Due Process," and Related Constitutional Rights.

Before the U.S. Constitution could gain acceptance, ten amendments known as the Bill of Rights, had to be added to protect the people against the arbitrary acts of the government. This concept can be traced back through an edict of the Holy Roman Emperor Conrad II, who, in 1037, declared that no man shall be deprived of his land but by the laws of the empire and the judgment of his peers. At Runnymede in 1215, the barons of King John compelled him to incorporate this principle in the Magna Carta. The exact phrase "due process of law" was used in the 1354 Statute of Westminster of the Liberties of London. Today the due process requirement is accepted as a restriction of government generally, in its legislative and administrative as well as its judicial activities. (Thomas E. Blackwell, College Law (Washington: American Council on Education, 1961), pages 17 & 18)

Without arguing the question of priority by virtue of antiquity, necessity, efficiency, or equity, we may also accept the right of government to carry out politically mandated, constitutionally recognized functions. In the administration of schools, and particularly in connection with student discipline, the right to function efficiently and effectively sometimes comes into conflict with the right of equitable and just treatment. How have courts resolved the conflict in extremis; i.e., in connection with student expulsions? What explicit requirements are placed on school authorities?

In the case briefed above (State v. Hamilton, Mo. 1890) "due examination" was expected but a formal trial with written charges, notice

of hearing, witnesses, etc., were not required to expell a student guilty of general misbehavior. Three years theretofore when Dickinson College, a private institution which had received some financial aid from the state of Pennsylvania, expelled a senior student after a summary interview with the president, on account of his alleged participation in disorders on campus, the court ordered his reinstatement, holding that the college could not dismiss a student without ample notice of the charges against him, with time to prepare to meet them, and a hearing at which he should have opportunity to hear evidence against him, confront and cross-examine hostile witnesses, and call witnesses to introduce testimony in his behalf (Commonwealth ex. rel. Hill vs. McCauley, 3 Pa. Co. Ct. 77(1887).

Dunn, a student of Grove City College in Pennsylvania was advised that administrative remedies, including appeal to the board of trustees, must be exhausted prior to seeking relief in court (In re Dunn, 9 Pa. Co. Ct. 417 (1891). Later an Ohio court outlined the procedural requirements as follows:

> "It is not necessary that the professors should go through the formality of a trial. They should give the student whose conduct is being investigated every fair opportunity of showing his innocence. They should be careful in receiving evidence against him, they should weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood by all surrounding circumstances as to who is right, and then act upon it as jurors with calmness, consideration, and fair minds. When they have done this and reached a conclusion, they have done all that the law requires (Koblitz vs. Western Reserve University, 21 Ohio C.C.R. 144, 11 Ohio C.C. Dec. 515 (1901)."

This statement, representing good law for public colleges and universities for many years (Tanton vs. McKenney, 226 Mich. 245, 197 N.W. 510, 33 A.L.R. 1175 (1924), (State ex rel. Sherman vs. Hyman et al.; State ex rel. Avakian vs. same, 180 Tenn. 99, 171 S.W. 2d 822 (1942),

Certiorari denied. 319 U.S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703 (1943), (People ex rel. Bluett vs. Board of Trustees of University of Illinois, 10 Ill. App. 2d 207, 134 N.E. 2d 635 (1956), (Steiner vs. New York State Commissioner of Education, 161 5. Supp. 549 (1958) affirmed 271 F. 2d 13 (1959) certiorari denied, 361 U.S. 966, 80 S. Ct. 587, 4 L. Ed. 2d 547 (1960), was embellished by the Montana Supreme Court when it concluded that certainly a student could not be entitled to confront and cross-examine witnesses as in a trial in a court of law or equity, because there is no power vested in the president of the university to compel the attendance of witnesses nor to force them to testify if they were in attendance (Nor to punish them for perjury, we might add!) (State ex rel. Ingersoll vs. Clapp et al, 81 Mont. 200, 263 Pac. 433, memorandum decision certiorari denied, 48 S. Ct. 528, 277 U.S. 591 (1927), appeal dismissed 278 U.S. 661, 49 S. Ct. 7 (1928).

Students in private institutions of higher education were treated somewhat differently beginning in 1923 when the president of Bryn Mawr College dismissed a student without preferring any charges against her or holding any hearing. Though the only charge ever recorded against her was that "she didn't measure up to the standards expected of a typical Bryn Mawr girl," a peremptory writ of mandamus to compel her readmission was denied by a court which held that summary dismissal was authorized under a college catalog statement that "the college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable (Barker vs. Bryn Mawr College, 276 Pa. 121, 122 Alt. 220 (1923)." Similar contractual reservations were cited in other private university cases (John B. Stetson University v. Hunt, 88 Fla. 510, 102 So. 637 (1924), (Anthony v. Syracuse University, 224 App. Div. 487,

231 N.Y.S. 435 (1928) reversing 130 Misc. 249, 223 NYS. 796 (1927), (De Haan v. Brandeis University, 150 F. Supp. 626 (D.C. Mass. 1957), though in De Haan v. Brandeis, Chief Judge Sweeney allowed "it might be better policy to hold a hearing. . ."

In Anthony v. Syracuse the opinion of the lower court, though reversed on appeal, is of considerable interest. In brief, it held that Syracuse University, though a private corporation, performs public services of such far reaching character as to become a quasi-public institution so as to be affected by considerations of public policy; and that its reservation of the right to dismiss a student without stated cause is contrary to public policy, is arbitrary, is repugnant, and tends toward injustice and oppression.

Meanwhile, cases involving the expulsion of elementary and secondary students were also being reviewed by the courts. In a Massachusetts case (Morrison v. City of Lawrence, 186 Mass. 456, 72 N.E. 91 (1904), the court recognized that the school committee had no power to compel witnesses to attend or testify at hearings, as did the court in Pennsylvania (Mando vs. Wesleyville School District, 81 Pa. D. &. C. 125 (1925), (Hollenbach v. Elizabethtown School District, 18 Pa. D. & C.2d 196 (1959), and the court in New York (Madera v. Board of Education of City of New York, 276 F. Supp. 356 (1967), but required that the student be given written reasons for exclusion, the opportunity to be heard, and the opportunity to provide evidence in his own behalf.

Three years later, in Nebraska, a girl was expelled without notice and without a hearing. The district court issued a writ of Mandamus requiring her reinstatement, but was reversed by the supreme court because, "The Statute under which the board is authorized to expel a pupil does not, in terms, provide for any notice, either to the

pupil or to the parents, that a hearing is to be had . . ." (Vermillion v. State, 78 Nebr. 107, 110 N.W. 736, 15 Ann Cas. 401 (1907). An Illinois court (Smith v. Board of Education, 182 Ill. App. 342 (1913) agreed that, "In order to carry out the powers and duties of school directors. . . no form of trial or hearing is prescribed. . ." but in Massachusetts, where the statutes required notice and hearing, the courts persisted in upholding the students' right to both (Jones v. City of Fitchburg, 211 Mass. 66, 97 N.E. 612 (1912), (Leonard v. School Committee of Attleboro, 212 N.E. 2d 468 (Mass. 1965).

In Virginia, where appeal to the county school board for review of acts of school officials is provided for in the state statutes, oral notice, to the father, of his child's suspension for leaving school to eat lunch with the father was held to be sufficient (Flory et. al. v. Smith et ux. (134 S.E. 360, Va. 1926). Failure to object to proceedings and failure to speak in defense during the informal hearing were cited as waivers of the right to do both in Pennsylvania (Mondo v. Wesleyville, (Pa. 1925). And a California court ruled that "Disciplinary hearings are to be held in private unless an open, public hearing is requested by the student (Elder v. Anderson 23 Cal. Rptr. 48 (1962)."

Whether or not school authorities must allow a child to be represented by counsel at conferences and hearings which may result in suspension is unclear at present. Two New York cases are in point: in the first (Cosme vs. Board of Education of City of New York, 270 N. Y. S. 2d 231 (1966), right to be represented by counsel was denied until after local hearings and a review by the State Commissioner of Education (all of which were considered administrative in nature) were complete. Indeed the court opined that the very purpose of such

hearings would be frustrated or impeded by the presence of counsel. In the second case (Madera vs. Board of Education of City of New York, 276 F. Supp. 356, 386 F. 2d 778 (appeal pending), the U.S. District Court ruled that "While school officials are not required to have a full, judicial style hearing with cross examination of child witnesses and strict application of rules of evidence, a hearing board may not preclude the child's parents from exercising their constitutionally protected right to be represented by counsel. . ." The U.S. Court of Appeals reversed this decision stating that a guidance conference is not a criminal proceeding and thus the counsel provisions of the Sixth Amendment to the U.S. Constitution are inapplicable. The case has been appealed to the U.S. Supreme Court.

While the discretionary right of a private university to grant or withhold a hearing prior to expulsion has been recently reaffirmed (Greene vs. Howard University, 271 F. Supp. 609 (D.C.D.C. 1967), the procedural rules for public institutions have been made more explicit, because "whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonent with due process of law. . ."(Dixon vs. Alabama Board of Education, 294 F. 2d 150 (U.S.C.A. 1961) reversing 186 F. Supp. 745 (D.C. Ala. 1960), certiorari denied 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961).

The procedural due process now required when a student is suspended or expelled by a public college or university includes the following: (1) the student must be given notice of the charges against him and the ground which, if proven, would justify expulsion or suspension; (2) he must be given the names of the witnesses against him and an oral or written report on the facts to which each witness testified; (3) he must be given a hearing (public if requested by the student) and the

opportunity to confront witnesses against him and to present oral and wirtten evidence in his defense; (4) he must be notified of the time, place, and date of the hearing and allowed sufficient time to prepare a defense; (5) any action against him must be taken by a duly established disciplinary body operating under regular procedures; and (6) a report of the findings and results of the hearing must be made available for his inspection (Dixon vs. Alabama (1961), (Knight vs. State Board of Education et al., 300 F. Supp. 174 (D.C. Tenn. 1961), (Due vs. Florida A. and M. University, 233 F. Supp. 396 (U.S.D.C.N.D. Fla. 1963), (Woody vs. Burns, Governor, et al., 188 So. 2d 56 (Fla. 1966), (Cornette vs. Aldridge, 408 S.W. 2d 935 (Tex. 1967), (Goldberg vs. Board of Regents of the University of California, 57 Cal. Rptr. 463 (1967), (Wasson vs. Towbridge, 382 F. 2d 807 (U.S.C.A.N.Y. 1967), and (Wright vs. Texas Southern University, 277 F. Supp. 110 (D.C. Tex. 1967).

In Wasson vs. Towbridge the court held that the student was "not entitled to see confidential opinions of members of the faculty" but the student "should not be dismissed without the holding of an evidentiary hearing into the nature of the concealed evidence, if any, and the reason for withholding it."

Where a valid university regulation required students to notify the university of changes of address, notice of hearing mailed to the address of record was sufficient notice (Wright vs. Texas Southern (D.C. Tex. 1967).

Finally, and again, procedures for dismissing college students are not "analogous to criminal proceedings and could not be so without being both impractical and detrimental to the educational atmosphere

functions of a university. . ." a full dress hearing, with the right to cross examine witnesses, the privilege against self-incrimination, and strict criminal evidence rules is not required for "such a hearing, with the attending publicity and disturbance of university activities, might be detrimental to the educational atmosphere of the university and impractical to carry out," (Dixon vs. Alabama (1961) and (Goldberg vs. Regents (Cal. 1967).

Some advocates of one extreme position maintain that due process as defined and practiced in our courts of criminal law should be followed on college campuses (Clark Byse, Tenure in American Higher Education (Ithica: Cornell University Press, 1959), pages 170-178). Advocates of another extreme position hold that due process as formally defined cannot be practiced realistically in an educational community and that each college must evolve its own due process in the light of its objectives and traditions (Edmund G. Williamson, Student Personnel Services in Colleges and Universities, (New York: McGraw-Hill, 1961), pages 163-171). The courts perhaps seek an equitable middle ground.